The Solicitors' Journal

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Current Topics.

Expenses of the High Sheriff.

IT was announced in the Press on 14th March that the Privy Council, with the concurrence of the Lord Chief Justice, is taking steps to relieve the High Sheriffs for the period of the war of some of the expenditure they have to meet during their terms of office, expenditure which is often considerable. It is proposed to simplify the ceremonial observed at the assizes, and representations are being made to High Sheriffs emphasising the necessity of making drastic reductions in the customary scale of entertaining. Such representations are not entirely unnecessary, as although the scale of entertaining has already in many cases been voluntarily diminished by public-spirited sheriffs, and compulsorily diminished by rationing and limitation of supplies, there is always the danger that traces of the old expensive hospitality may linger here and there. This is inevitable, as the office of High Sheriff is the oldest secular office under the Crown, and the Crown's stoutest supporters from the earliest days were the sheriffs. As the county's representative the sheriff is allowed a grant from the Treasury towards the expense of the maintenance of the dignity of his office, but most sheriffs find that in peace time the grant is by no means equal to the actual needs of their office. At one time the sheriff was in fact as well as in theory "the governor of the shire, the captain of its forces, the president of its court, a distinctly royal officer, appointed by the King, dismissible at a moment's notice, strictly accountable to the Exchequer." Now such functions as are not of a purely ceremonial nature are deputed by the Sheriff to the Under-Sheriff, the latter being frequently a solicitor, who summons and returns juries and enforces High Court judgments by levying execution. Though shorn of much of his ancient power, the ceremonies which the sheriff performs, such as, for instance, the attendance on the judges at assizes and on election petitions, are no mere empty and meaningless pomp, but as integral a part of the constitution as the existence of the Privy Council itself, who, as traditional overseers of the sheriffs, have issued their latest appeal. The restoration of a state of peace should bring with it, among other things, a revival of the ancient and necessary glories of the sheriff's office.

The Solicitors Bill.

ON 11th March LORD WRIGHT introduced the new Solicitors Bill in the House of Lords. It is new, because although it incorporates the provisions of the Bill which was amended by the Joint Select Committee (ordered to be printed on 24th July, 1939), it works out the proposals of that Bill in greater detail and with more symmetry. Every solicitor is to deliver to the registrar once in each practice year an accountant's certificate stating that the accountant has examined the books and accounts of the solicitor or firm concerned for the accounting period, and is or is not satisfied that the solicitor or firm has complied with the provisions of the Solicitors' Accounts Rules, and, if not, the matters with which he is not satisfied. A solicitor may apply to the Council for an order that an accountant's certificate is in the circumstances unnecessary, and rules must be made by the Council prescribing, *inter alia*, what evidence shall satisfy it on such an application. A new and salutary clause is that providing for the establishment of a "Compensation Fund" to relieve or mitigate losses sustained by any person in consequence of dishonesty of any solicitor or any clerk or servant of any solicitor in connection with his practice or any trust of which the solicitor was a trustee. A contribution of £5 or less, as fixed by the Council from time to time, is to be paid by the solicitor to the registrar on the issue of a practising certificate, together with the fee payable in respect of such certificate. This is not to apply to the first three practising certificates issued after admission, and only one-half of the annual contribution is to be paid in respect of the next three practising certificates. The Council may at their discretion exempt a solicitor from the payment of the whole or part of the annual contribution if he has been in national service during any part of the preceding practice year. The Bill in its present form consists of thirty clauses and three schedules. It is a comprehensive measure, providing detailed amendments of the present enactments with regard to membership of the Society, appointment of committees of the Council, the declaration by the applicant for a practising certificate, the suspension of a practising certificate, the prohibition of taking articled clerks in certain cases, restrictions on the employment of a clerk who is found a party to the misconduct of a solicitor, and certain procedural matters. It is also a drastic measure, but the solicitor's responsibility is heavy, and none will be found to complain that the sanctions enforcing it are correspondingly serious, especially if the confidence imposed in the profession by the general public will be thereby enhanced.

The War Damage Bill.

THE House of Lords managed to complete the Committee stage of the War Damage Bill in three days, a notable feat, particularly having regard to the fact that two marshalled lists of amendments, published respectively on 10th and 11th March, each filled twenty-two pages of print. On the first day (11th March) LORD ADDISON, in moving certain amendments to cl. 1, drew attention to the fact that there were three schemes of insurance embodied in the Bill, one as to land and buildings administered by the War Damage Commission and the other two as to business and private chattels, administered by the Board of Trade. He said he was appalled at the prospect of the ordinary citizen trying to get his money under three separate schemes from two separate bodies, and wanted to get some simplicity into it. This was supported by two speeches from other noble lords. The Lord Chancellor, in replying, recognised the seriousness of the suggestion, but doubted whether it would simplify or hasten proceedings to put the whole Bill in charge of a single organisation as if it were a sort of Pooh-Bah. The Government had carefully considered the matter, which had been investigated at an earlier stage, and having regard to the differences in the valuation of land and goods and the special experience of the Board of Trade in regard to the insurance of goods, it could not accept the suggested rearrangement. Another suggested amendment that the damage compensated should include the non-payment of rent, was also withdrawn when the Lord Chancellor pointed out that if such compensation were paid

then everybody who suffered business loss would have to be compensated. On the second day (12th March) THE EARL OF CLANWILLIAM pointed out that the clause providing for the payment of compensation was purely permissive, as it provided that "the times when payment may be made" should be, in the case of cost of works payments, at the time of completion of the work, and in the case of value payments, "such time or times as may be specified in regulations made by the Treasury." The House accepted the Lord Chancellor's statement that "may" really represented an assurance that in the case of cost of works payments they would be made when the work was done. Considerable discussion, lasting two hours on the second day and an hour on the third day, took place with regard to a new clause, proposed by LORD BARNBY, and providing for indemnity by mortgagees against contributions in the case of mortgages to which the Act did not already apply. LORD MAUGHAM pleaded for a reasonable compromise to remove what he regarded as a blot on the Bill. The Lord Chancellor replied that it was a matter of trying to get an even balance of justice and he felt he must resist the proposed new clause. If experience will later prove the Goverment to be wrong on this or other matters, it will not adopt any academic attitude if it should be necessary to pass amending legislation.

The Liabilities (War Time Adjustment) Bill.

THE contemplated legislation for the further relief of war-time debtors which was referred to in our issue of 8th March (p. 110), has now appeared in the form of the Liabilities (War Time Adjustment) Bill, which was introduced by the Lord Chancellor and given a first reading in the House of Lords on 13th March. It is a comprehensive measure, consisting of twenty-eight sections and occupying twenty-five pages of print. It enables a person in serious financial difficulties owing to war circumstances to apply to a "liabilities adjustment officer" for advice and assistance in enabling him to arrive at an equitable and reasonable scheme of arrangement with his creditors. The Lord Chancellor is to appoint at least one liabilities adjustment officer for every county court district, together with any necessary officers and assistants. The main provisions of the Bill apply a modified bankruptcy procedure to the settlement of creditors' claims, whether by a scheme of arrangement approved by the liabilities adjustment officer, subject to an appeal to the court by a non-assenting creditor, or by application to the court for a "protection order" by any of certain persons. These persons are (*a*) the debtor; (*b*) a creditor who is prevented by reg. 4 or reg. 6 (2) of the Defence (Evacuated Areas) Regulations, 1940, from commencing or prosecuting proceedings or exercising any remedy in respect of a provable debt; or (*c*) where the debtor has been granted and is still enjoying relief under s. 1 of the Courts (Emergency Powers) Act, 1939, a creditor with a provable debt. Provision is also made for disclaimer of property, rescission of contracts, alterations of leases and tenancy agreements, vesting of property hired by the debtor under hire-purchase agreements, priority of debts, orders of discharge, the application of the Bill to partnerships and private companies, and the protection of mortgagees. The Courts (Emergency Powers) Acts, 1939 and 1940, are to be extended to contracts made after the commencement of the war, and the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, is to be similarly extended to mortgages made after the commencement of the war. It is clear from the terms of the Bill that one of its main objects is to provide relief for those who through no fault of their own have been compelled to terminate their businesses in "evacuated areas." This is a matter of urgency as well as necessity, both from the point of view of the debtor and the creditor, and those responsible for the framing of the Bill deserve to be congratulated for hitting upon the simple and ingenious scheme of combining the advantages of bankruptcy procedure with the absence of any unpleasant taint. The urgency of its general objects and the uncontroversial nature of its proposals should secure for it an easy passage through its various stages.

"Black-out" Law in England and Scotland.

THE recent decision of LORD KEITH in the Court of Session in *Griffiths* v. *W. Alexander & Sons, Ltd.* (1941), S.L.T. 66, is interesting as a comparison, and in some ways as a contrast, with that of the Court of Appeal in *Franklin* v. *Bristol Tramways and Carriage Co., Ltd.* (1941), 1 All E.R. 186. In the latter case a pedestrian was overtaken in the "black-out" by two buses, one following the other at a considerable distance. The first swerved violently to avoid him, but the second knocked him down and fatally injured him while he was apparently crossing the road. Although negligence in regard to lighting was found proved as regards the driver of the vehicles, the claim failed, as the court held that there was contributory negligence on the part of the pedestrian. Lord Justice SCOTT held that "in black-out conditions there is imposed on the person on the road a new duty of bearing in mind the difficulty which the driver of an on-coming vehicle will have of seeing a person . . . and of realising that it is his duty . . . to take all reasonable steps to minimise such difficulty." In the Scottish case a pedestrian was knocked down by a vehicle approaching from behind, and LORD KEITH held that the driver of a vehicle was under an obligation to draw up within his range of vision if necessary. Contributory negligence was not alleged by the defenders, as the pursuer was held by LORD KEITH to be perfectly properly on a country roadway with his back to overtaking traffic, and the pursuer's averment that the pedestrian's flashing of a torch should have made him easily seen by on-coming traffic was apparently accepted. Obviously the result of the Scottish case is to impose upon the motorist a much heavier burden of caution once he crosses the border. It is doubtful whether a court on this side of the border, bearing in mind the exigencies of night traffic and the transport needs of densely populated areas, would be found to uphold this stern view of the motorist's duties.

An American Comment.

ANOTHER aspect of the development of black-out law in England is the subject of an American comment in the *New York University Law Quarterly Review* for January, 1941. In an article on the recent decision of the Court of Appeal in *Lyus* v. *Stepney Borough Council* (84 SOL. J. 694) the writer states that the judgment in that case gave notable evidence that the English courts permit existing laws to be qualified no more than is actually necessary by the extraordinary legislation created by England's war effort and that there is no escape from liability by a mere plea of war-time emergency. The writer goes on to quote authority for the proposition that there is a presumption that an ordinary statute does not operate to repeal by implication or unnecessarily to change any Acts and rules on common law except those which are repugnant to and inconsistent with the intention and scope of the enactment. In *Lyus' Case* the court followed its previous decisions in *Greenwood* v. *Central Service Co., Ltd., and St. Marylebone Borough Council* (84 SOL. J. 489) and *Wodehouse* v. *Levy* (84 SOL. J. 694) that highway authorities were under no absolute obligation to light obstructions which they had statutory authority to place on the highway. In *Wodehouse* v. *Levy, supra*, MACKINNON, L.J., held that there was no statutory or common law obligation to light a bollard on a refuge, as the peace-time obligation to light the streets under s. 130 had been temporarily repealed by the Lighting (Restrictions) Order. The comment in the later part of the American article makes it clear that the news of the reversal by the Court of Appeal of the decision of HUMPHREYS, J., in *Lyus* v. *Stepney Borough Council, supra*, had not reached the writer, who enlarges on a vague common law obligation resting on the highway authority to exercise reasonable care to provide that the public's use of the street was not made hazardous. The writer does, however, make the interesting observation that since a duty of care is always measured by surrounding circumstances, "a showing that a necessary preoccupation with defence preparations prevented adequate marking of the obstruction might well have produced a different result." This statement is all the more interesting in view of Mr. Justice CASSELS' recent judgment in *Jelly* v. *Ilford Corporation* (*The Times*, 4th March), where he held that the defendants were not negligent in failing to light or whitewash a sandbag blast barrier on a footway, and said that black-out conditions were prevailing at the time, and that there were many unlighted obstructions on pavements in such conditions, for example, lamp-posts, telegraph-posts, and pillar boxes, and though there was some advantage in having a splash of white paint on those things, its absence did not constitute negligence. The public, he added, must take the highways as they found them.

Recent Decisions.

In *Weston* v. *London County Council* on 11th March (*The Times*, 12th March) WROTTESLEY, J., held that a London County Council Technical Institute, where instruction was given in the use of wood-cutting machinery, was not a factory within s. 151 of the Factories Act, 1937, and on the facts that there was no negligence in not fencing machinery.

In *Fredenson* v. *Rothschild* on 13th March (*The Times*, 14th March) BENNETT, J., held, in an action for rectification of a deed of covenant providing to the plaintiff, a "clear yearly sum of £550 a year," that the plaintiff had not discharged the burden of proving that the settlor had intended that that £550 should be free of any deduction, tax or otherwise.

Dealing "for the Benefit of" an Enemy.

IN *Stockholms Enskilda Bank Aktienbolag* v. *Schering, Ltd.* (1941), 1 All E.R. 257, Sir Wilfrid Greene, M.R., delivered an important judgment upon the meaning of s. 1 (2) of the Trading with the Enemy Act, 1939, by which a person is deemed to have traded with the enemy

> "(*a*) if he has had any commercial, financial or other intercourse or dealing with, or for the benefit of, an enemy, and, in particular, but without prejudice to the generality of the foregoing provision, if he has . . .(ii) paid or transmitted any money . . . to or for the benefit of an enemy . . . or (iii) . . . discharged any obligation of an enemy . . ."

The Swedish bank owned Reichsmarks worth £84,000, which a German company agreed to acquire for £50,400 in sterling, i.e., at 12s. in the £. Through exchange difficulties, the German company decided to arrange this payment of sterling through two subsidiary companies: an English company, Schering, Ltd., and an Indian company.

The contract upon which the bank sued was made on 16th April, 1936. In February, 1936, an earlier contract had been made between the bank and the German company and the English and Indian companies as *sureties*. The bank agreed to place the Reichsmarks at the disposal of the German company who became a debtor to the bank for £50,400 sterling, free of interest, the debt to fall due in eight years, and to be repayable in sterling, unless German exchange enactments should prevent it—in which case it would be paid into a blocked account, in Reichsmarks, at the official Berlin rate of exchange. By cl. 3, the English and Indian companies became *sureties*, jointly and severally liable as principals for that amount. By cl. 4, the English and Indian companies, or one of them, should provide, *as principals*, the sterling necessary for repayment. The sureties were to acquire from the bank their claim against the German company by instalments; should the two companies make default in acquiring an instalment on the due date, the German company would lose a proportion of the discount—8s. in the £. If the companies made default in paying the debt, the German company would owe £84,000 less payments made, treated as 20s. for every 12s. actually paid. It was therefore to the advantage of the German company that the obligations of the English and Indian companies should be punctually performed. By cl. 7 the bank could call in the debt if the German company or a surety became bankrupt or applied for an arrangement. German law applied to the contract of debt; English law to the relationship between the bank and the English and Indian companies.

The contract sued upon, of 16th April, 1936, was made between the bank and the English and Indian companies. The two companies jointly and severally *guaranteed* the payment by the German company of £50,400, in consideration of an advance by the bank of £84,000 sterling, to be available in sperrmarks (which are more effectively blocked). The two companies jointly and severally agreed *as principals* to make payments to the bank, if the bank assigned to them, on the occasion of each payment, an equivalent sterling amount of the bank's claim against the German company. One instalment of £3,360 was to be paid before the expiration of three and a half years. Each payment would be a *pro tanto* satisfaction of the two companies' liability; the contract was to be governed by English law. This instalment was not paid on the due date, and the bank sued the English company for payment. The proper form of the action would have been a claim for specific performance, for an order that, against payment of the instalment, the bank should execute an assignment of the debt *pro tanto* discharged.

The defence was that the German company had become an enemy within s. 2, and that to pay the company would constitute a trading with the enemy, within s. 1 of the Act. And so Hawke, J., held. It would be a *dealing* "for the benefit of" an enemy; it would be a *payment* for the benefit of an enemy; it would *discharge an obligation* of an enemy.

The plaintiffs, citing *R.* v. *Kupfer* [1915] 2 K.B. 321, argued that payment for the benefit of an enemy did not include a case where payment was made in pursuance of a pre-war obligation from an English company to a Swedish bank merely because it *incidentally* benefited an enemy. The object of those words, they said, was "the avoidance of indirect devices and tricks and so forth designed to evade the purpose of the Act." The learned Master of the Rolls did not agree—with whom MacKinnon and du Parcq, L.JJ., concurred—saying: "Those words are of the widest possible character, and they are wide enough to take in any transaction of which it can be truly said (and this is a question of fact in each case), that it is for the benefit of an enemy" (at p. 265 of (1941), 1 All. E.R.). In a case of "great hardship," or a case which "technically" came within the Act, but produced "no practical injury to the State," it was always open to a Secretary of State, or the Treasury, or the Board of Trade, to grant a licence.

The effect of the payment, in the present case, would be for the benefit of the German company; it would preserve the benefit of the discount, and the German company would, *pro tanto*, be relieved of its obligation to the Swedish bank. It is true that there would then be a liability to a British company—unenforceable, however, during the war. "The effect would be to substitute a British creditor for a neutral creditor, and that seems to me to be a benefit to the German company" (at p. 266). The case came within the general words of s. 1 (2) (*a*)—a dealing for the benefit of an enemy; it came within a payment for the benefit of an enemy; the payment, further, would discharge an obligation of the German company (s. 1 (2) (*a*) (ii)). For payment, the bank must be prepared to make an assignment—which would extinguish or *discharge* the German company's obligation to the bank.

In the Court of Appeal, the bank further argued that even if payment would be an offence under the Act, they were nevertheless entitled to a declaratory judgment on the merits, with a stay during the war. The court declined to accept this argument; payment was prohibited and was illegal, even though the illegality lasted only so long as the company remained an enemy. The dismissal of the action would not imply *res judicata*: the action was, in effect, premature, and could be brought after the war. (See *per* Tomlin, J., in *Wilderman* v. *F. W. Berk & Co.* [1925] Ch. 116, 123.) "On principle," said Sir Wilfrid Greene, M.R., "I should have felt no doubt that the plea of the statute was a defence to the action, and that, once it was established, the action should be dismissed with the usual consequences" (at p. 268).

In *Schmitz (Schmidt)* v. *Van der Veen* (1915), 84 L.J.K.B. 861, however, Rowlatt, J., gave judgment for the plaintiff, provided that the order was so framed that no part of the money should go to his German associate in Germany. S had bought goods from the German in Germany and sold them here. He was to receive a commission, and to share the excess over a fixed sum with the German. S sued the buyers of the goods, who raised the point that he could not recover the price because an enemy would be entitled to half. Rowlatt, J., made an order staying execution until a summons for a vesting order should be taken out and heard. No objection could then be taken, for, under the Act, the rights of enemies could be vested in the Custodian of Enemy Property. Payment to the British subject would then be no offence. In the present case, however, the benefit obtained by the German company would "accrue to it automatically the moment the payment is made, and there is no possible means of stopping it, by a vesting order or otherwise" (at p. 269).

Sir Wilfrid Greene, M.R., followed the line of thought he had used in *Eichengruen* v. *Mond* (1940), 3 All E.R. 148, where a statement of claim, on the face of it unsustainable, was struck out, and the action dismissed, the plaintiff having become an enemy alien. Was a British subject to have this action "hanging over him for an indefinite period merely because the plaintiff is an enemy alien?" (at p. 153).

On the other hand, in *Porter* v. *Freudenberg* [1915] 1 K.B. 857, 889, Lord Reading, C.J., indicated that the right of an alien enemy to sue was "suspended" during war (cf. Bullen and Leake, "Precedents of Pleadings," 1935, 9th ed., pp. 594, 595, upon a stay of proceedings).

In these two cases, however, it should be pointed out, the question discussed (*inter alia*) was whether an alien enemy could sue. In the present case, the German company was not a party to the action. The rule which forbids an alien enemy to be heard as a plaintiff is "an unqualified rule of personal disability" (*per* Lord Sumner in his *dissenting* speech in *Rodriguez* v. *Speyer Brothers* [1919] A.C. 59, 117); certain exceptions, however, have been grafted upon the rule. In the present case, on the other hand, an action was brought upon a transaction which, by statute, was illegal. The fact that it was illegal *merely* because it was a dealing with a person who was at present an alien enemy (if, in this respect, the word "*merely*" is, indeed, appropriate), is irrelevant. An action brought upon an illegal contract must be dismissed.

The next Quarter Sessions of the Peace for the Borough of Wolverhampton will be held at the Sessions Court, Town Hall, North Street, Wolverhampton, on Friday, 18th April, at 10 a.m.

The following telegram has been received by the Bar Council in reply to the telegram sent by them to the Athens Bar (85 SOL. J. 108): "The administrative council of the Athens Bar, interpreting the feelings of the lawyers of Hellas, replies to the lawyers of England, gallant champions of justice, requesting them to accept heartiest thanks for their brotherly message expressing mutual pride and satisfaction at the struggle carried out against the common enemy."

A Conveyancer's Diary.

The War Damage Bill.

I HAD intended to discuss the War Damage Bill again at the stage when it went to the House of Lords. But its recent progress has been so rapid that that course has proved impossible. Pending consideration of the measure as an Act, it will suffice to say that a large proportion of the technical criticisms here made have been adequately met by amendments in the House of Commons, and it is therefore reasonable to expect that a greatly improved text will emerge after further revision by their lordships, whose special experience is always of high value in legislation of this character.

Re Owers.

I AM asked by a correspondent to deal with *Re Owers*, now reported at [1941] Ch. 17. The material facts were as follows: Ernest Owers died in 1938 leaving a will, by cl. 6 of which he bequeathed to one Death the sum of £50,000. By cl. 8 he directed, *inter alia*, that the legacy duty in respect of legacies given by his will "shall be borne by my residuary estate." Clause 10 was the stock clause creating a trust for conversion and payment of debts, legacies and testamentary expenses. As the case raises the question of the framing of such a stock clause it is necessary, however, to set it out: "I devise and bequeath all my real and personal estate not hereby otherwise disposed of (including all property, whether real or personal, over which I may have any power of appointment or disposition by will) unto my trustees, upon trust that my trustees shall sell, call in and convert into money the same and shall out of the moneys arising thereby or otherwise forming part of my estate pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil thereto and make provision as aforesaid for the payment of any annuity so bequeathed and all duties free from which any legacies or annuities may be bequeathed." Ultimately he gave the residue of those proceeds of sale for division among a number of charities.

Now, the point was this. The legacy of £50,000 was made payable out of a mixed fund of proceeds of sale of realty and personalty. The estate duty on the personalty, being a testamentary expense, was, of course, payable out of the mixed fund and none of it fell on the legatee. The estate duty on real estate is not, however, a liability of the executor, but is a charge on the realty and on those taking the realty. Was the legatee to bear a proportion of the estate duty on realty? If so, of course, there would have to be a double apportionment, namely, one would have to ascertain the proportion of the whole estate duty attributable to the £50,000 legacy, and would then have to apportion that sum between realty and personalty in the proportion that the whole of the realty bore to the whole of the personalty. Having done that, it would be possible to say what amount of the total estate duty was to be ascribed to the realty-segment of the legacy, and charge that to the legatee in exoneration of the general estate. The legatee naturally contended that what he was to get was £50,000 (he was expressly relieved of legacy duty), and that the direction that the mixed fund should bear "testamentary expenses" served to free him from any liability at all to contribute to estate duty. Most of us would, I think, have expected this contention to be right unless we had happened to know *Re Spencer Cooper* [1908] 1 Ch. 130, and I have little doubt that that is what we mean to do when we draft wills which employ the usual trust for conversion and payment of, *inter alia*, testamentary expenses. In fact, however, the legatee's contention failed both before Morton, J., and the Court of Appeal.

The basis for this decision was *Re Spencer Cooper*, a decision of Swinfen Eady, J., in a substantially similar case. That learned judge there laid down, following two earlier cases, that a direction to pay legacies out of a mixed fund throws them *pro rata* on realty and personalty. Further, the gift of a legacy out of proceeds of realty is not a disposition of the testator's personal estate, but of his real estate, notwithstanding that a trust for conversion turns the realty, in the hands of the devisee-in-trust, into equitable personalty. But estate duty on real estate is not a testamentary expense, since the executor can obtain probate without having first paid it, as he must do with estate duty on the free personal estate. It followed that, so far as the legacy was a disposition of realty, the duty on it was not a testamentary expense and was not thrown by the will on the mixed fund. The duty on the proportion of the legacy attributable to realty therefore lay, where it originally fell, on the realty, and, *pro rata*, on the person taking the realty. A comparable case is that where legacies are payable on the death of a tenant for life out of the corpus of a settled legacy. The duty on the cesser of the interest of a tenant for life in a settled legacy does not fall on the personal representatives of the tenant for life, but upon the persons taking the corpus in proportion to their interests (see *Berry* v. *Gaukroger* [1903] 2 Ch. 116), unless the gift of the settled legacy is so worded as to shift its ultimate incidence upon those primarily accountable.

It was argued in *Re Owers* that the law had been altered by L.P.A., 1925, s. 16, and Ad. of E.A., 1925, s. 2, which operate to impose on the personal representatives a liability to pay estate duty on realty. But the Court of Appeal would have none of this suggestion, pointing out that Ad. of E.A., s. 53 (3), and L.P.A., s. 16 (5), provide that nothing in those Acts is to alter the rules as to *ultimate incidence* of estate duty. It was also argued that *Re Spencer Cooper* was not binding on the Court of Appeal and ought not to be followed. This argument also was not accepted, and it may now be taken as settled law that where a legacy is given out of a mixed fund on which testamentary expenses are charged the legacy itself has to bear its proportion of estate duty on realty.

I do not think anyone pretends to like this rule. For example, the Master of the Rolls indicated (at p. 19) that it was "a trap into which I have no doubt many testators fall, and into which many testators will continue to fall. Where a testator gives a legacy and provides in the usual form that it shall be paid out of proceeds of sale of his estate, one would expect him not to intend that the legacy should be cut down by being forced to contribute to the estate duty payable in respect of his real estate." Later, he said that one result of *Re Owers* would be to "bring out of its lurking place this unfortunate rule which I have no doubt has defeated the real wishes of testators."

Now, that being the rule, it is necessary to find a new common form to get round it, and every draftsman should bear it in mind as one of the things to be seen to, just like the exclusion of *Allhusen* v. *Whittel* and other rules which are apt to be a nuisance. It will be some time before a really satisfactory form is evolved, but for the moment I venture to suggest the following:—

"(1) I bequeath to A the sum of £50,000 free of legacy duty.

"(2) I devise and bequeath all my real and personal estate to my trustees on trust that they shall sell, call in, collect or convert into money the same so far as it does not consist of money.

"(3) Out of the net proceeds of sale so arising and out of my ready money my trustees shall pay my funeral expenses, debts, testamentary expenses and any duties which are not testamentary expenses arising at my death in respect of property passing under this my will or any codicil hereto, all such payments to be borne ultimately by the fund created by the last preceding clause in exoneration of any particular part of my estate or any person taking the same.

"(4) Subject thereto my trustees shall pay any legacies or annuities given hereby or by any codicil hereto and the duty on any of them that are given free of duty and shall hold the balance (hereinafter called 'my residuary trust fund') upon the trusts following:"

Alternatively, the following clause could be used in place of clauses (3) and (4) if the proceeds of personalty are going to be ample to pay the legacies and legacy duty:—

"(3) Out of the net proceeds of sale so arising and out of my ready money my trustees shall pay my funeral expenses, debts, and testamentary expenses and (primarily out of the proceeds of sale of my personal estate and ready money and in priority to other charges on such proceeds and money) any legacies given hereby or by any codicil hereto and the legacy duty on any such legacies that are given free of duty and shall hold the residue of the said proceeds of sale and ready money (hereinafter called 'my residuary trust fund') upon the trusts following."

The rule in *Re Owers* only operates if the legacy is to come out of a mixed fund *and* if the only charge of estate duty on the whole of that fund is by the charge of testamentary expenses. The first of the foregoing solutions (both of which are rough and unpolished) operates by charging on the mixed fund the duty on realty as well as such duty as is a testamentary expense; the latter by charging the legacy itself primarily on personalty. Further reflection by the profession at large will doubtless suggest other and neater methods of accomplishing the same end.

Neither *Re Owers* nor *Re Spencer Cooper* sufficiently descends to details to inform us how the calculations are to be done in cases where the "unfortunate rule" applies, but, presumably, the values of realty and personalty are to be taken as at the death. The legacy subject to the rule can, I think, safely be paid by the executor without waiting for the final figures; the duty in question is not one for which he is accountable, and if more has to be paid the Revenue will have to go against the legatee. I think also that where the nominal

value of a legacy is depleted by this liability for estate duty, the legacy duty which the executor has to pay, assuming the legacy is given free of duty, is on the *net* value, by analogy to the case of an abated legacy. Thus, in this way, too, as well as in shifting the liability for estate duty, the "unfortunate rule" is distinctly beneficial to the residuary legatee.

Landlord and Tenant Notebook.

Sub-Tenants becoming Tenants under the Rent Acts.

THE position of sub-tenants of properties controlled by the Rent, etc., Restrictions Acts when the mesne term is eliminated was settled in the early 'twenties. Section 15 (3) of the 1920 Act provided: "Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, *or for any other reason*, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued." This is, as it were, the deserted sub-tenants' charter; its main effect and those of its qualifications were soon to be illustrated by reported cases.

At the same time s. 5 (5) provided: "An order or judgment against a tenant for the recovery of possession of any dwelling-house or ejectment therefrom under this section shall not affect the right of any sub-tenant to whom the premises or any part thereof have been lawfully sub-let before proceedings for recovery, etc., were commenced, to retain possession under this section, or be in any way operative against any such sub-tenant."

Section 15 (3), which was new at the time, has not been affected by any subsequent Acts; as to s. 5 (5), "this section," which was the section containing the restrictions on possession, has been amended and replaced from time to time, but the qualifications which matter are now to be found in Sched. I of the 1933 statute.

Before any attempt was made to exploit the above provisions, *Dick* v. *Jaques* (1920), 36 T.L.R. 773, showed the weakness of a sub-tenant's position when the head lease prohibits alienation. The plaintiff in that case let a flat to one of the defendants in 1918, the tenancy being for two years and then from year to year, the agreement prohibiting alienation without consent and containing the usual proviso for re-entry. In 1919 the first defendant asked for permission to sub-let to the other defendant, and this was granted for a three months' sub-tenancy. When that expired, the parties agreed to a further sub-tenancy "for the remainder of the term." The plaintiff sued for possession on the ground of forfeiture, and the second defendant asked for relief.

His knowledge of the position was held to disentitle him from relief, in accordance with the principles laid down in *Imray* v. *Oakshette* [1897] 2 Q.B. 218 (C.A.) (which, in fact, goes further: the claimant in that case did not know but ought to have known of the restriction). As regards the Rent Act provisions then in force, the plaintiff relied on that qualification of the restriction on his rights which was then contained in s. 1 (3) of the 1915 Act: ". . . so long as the tenant continues to pay rent and performs the other conditions of the tenancy." The second defendant's argument was that if that entitled the court to give judgment against the mesne tenant, it did not affect his own statutory rights, but this did not appeal to Peterson, J., who considered there was nothing to prevent him from giving judgment for possession. But for the qualification the second defendant would have had a strong case, for unauthorised alienation does not prevent an alienee from acquiring a good title.

Section 5 (5) and s. 15 (3) were heard of in *Lord Hylton* v. *Heal* [1921] 2 K.B. 438, in which the defendant was a sub-tenant to whom the premises had been sub-let by the plaintiff's tenant, but with the plaintiff's consent, for the remainder of the mesne term. It was held or said that s. 5 (5) did not avail the defendant for the simple reason that there was no order or judgment against the ex-mesne tenant; all the sub-section meant was that where there was a sub-tenant lawfully and *de facto* in possession, the landlord could not avail himself of any such judgment but must commence separate proceedings; while in the case of s. 15 (3), this would have been an insuperable bar if it were not for the qualifying words "subject to the provisions of this Act." And the landlord had a ground for possession in that the mesne tenant had given him notice to quit and he had granted a lease to another party and would be "seriously prejudiced if he could not obtain possession" (s. 5 (1) (*c*); now para. (*c*) of Sched. I to the 1933 Act).

Mention was made of s. 15 (3) in *Reynolds* v. *Bannerman* [1922] 1 K.B. 719, when a landlord unsuccessfully sued a tenant who had given notice to quit but had failed to get rid of a sub-tenant of part of the house. It was held that the tenant's duty was not absolute; but the only relevance of s. 15 (3) was that it confirmed the view that occupation by a sub-tenant was not occupation by an agent.

Chapman v. *Hughes* (1923), 129 L.T. 223, however, clearly illustrated the importance of the qualification expressed by the adverb "lawfully." A mesne tenant, bound by a covenant to use the premises as a private dwelling and not to permit the premises to be used for the purposes of any business, sub-let the house to the defendant before the term reverted to the plaintiff, her landlord. The defendant, who refused to go, was described in the headnote as a piano tuner, in the statement of facts as a tuner and dealer in pianoforte instruments, in the judgment as being one or the other—it seems likely that he was both, for a tuner must rarely carry on business on his own premises. It was held that while the defendant, by virtue of s. 15 (3), had a statutory tenancy, s. 5 (1) (*a*) applied: "tenancy" included the original head lease. It might, I submit, well have been argued that the defendant was breaking what was an obligation of his own tenancy. It is not for nothing that s. 5 (1) (*a*) (now the 1933 Act, Sched. I (*a*)) uses wide language—"any other obligation of the tenancy"—and does not confine itself to agreed covenants; assuming that the defendant in *Chapman* v. *Hughes* was ignorant of the restriction on user, he would be bound by it in accordance with the rule laid down in *Patman* v. *Harland* (1881), 17 Ch. D. 353.

But this decision was distinguished in *Ward* v. *Larkins* (1924), 130 L.T. 184. The plaintiff in that case instituted forfeiture proceedings based on disrepair against the lessee of several properties comprised in a long lease and against sub-tenants, eight in all, of those properties. Sargant, J., after observing that to apply the last authority would be to stultify the Act, pointed out that in the case before him (1) the premises were lawfully sub-let, and (2) the sub-tenants were not privy to the breaches of covenant. It would seem, here, that if *Chapman* v. *Hughes* had been decided on the ground that the house was not lawfully sub-let because the mesne tenant knew of the intended user, the first distinction stands out clear; but a distinction could also be drawn, if necessary, by showing that, quite apart from the terms of the sub-lease itself, while a sub-tenant is not bound by the mesne landlord's repairing covenants, he is, according to *Patman* v. *Harland*, bound by restriction on user contained in the head lease.

Our County Court Letter.

Decisions under the Workmen's Compensation Acts.

Misuse of Circular Saw.

IN *Leaman* v. *Norrish*, at South Molton County Court, the applicant had formerly been employed at the respondent's hotel, in the garage of which there was a circular saw. On the 6th February the applicant had his thumb cut off by the saw and his case was that the accident happened while he was helping the respondent to cut some wood, which jammed in the saw. There had been no objection to the applicant's use of the saw and the respondent was holding the wood when the accident happened. The latter allegation was denied by the respondent, whose case was that the petrol engine (by which the saw was worked) had given trouble on the day in question. The respondent, who was using the saw himself, therefore left it for a short time. On hearing the sound of sawing the respondent was just in time to see the applicant cut his thumb off. Four former employees at the hotel gave evidence that the staff were forbidden to use the saw, which was only worked by the respondent personally. His Honour Judge Thesiger held that it was no part of the applicant's duty to use the saw, which did not enter into his work at the hotel. No award was therefore made.

Acceleration of Disease of Aorta.

IN *Tennant* v. *The Coppice Colliery Co., Ltd.*, at Walsall County Court, an award was claimed on behalf of the widow and five children of a deceased stallman. The deceased had been a strong, active man prior to the 20th May, 1940. On that day he received a blow on the chest from a bar, but he worked the two following days, and stayed away on the 23rd May. On the 24th May he gave up work after three-quarters of an hour and was X-rayed at the hospital. On the 13th June the deceased died suddenly. A post-mortem was held and the verdict at the inquest was that death was due to natural causes, viz., occlusion of the right coronary artery. A pathologist gave evidence, however, that the calcification of the aorta was the highest he had ever seen,

and the deceased could not have done heavy work if the same condition had been present before the 20th May. The conclusion was that the accident had accelerated the death, owing to the injury caused to the lining of the aorta. The case for the respondents was that the accident had nothing to do with the death, as shown by the evidence of a surgeon at the hospital, the doctor who made the post-mortem examination at the request of the coroner and the doctor who attended that examination on behalf of the miners' association. It was contended that the death was due to the failure of the blood supply, caused by the blocking up of the arteries, and that the calcareous material had been accumulating over a long period and was not affected by the accident. His Honour Judge Caporn observed that there was no explanation from the respondents of the circumstance that the deceased, having had nothing wrong with him before the 20th May, had suffered pain afterwards. The conclusion was that the blow had much accelerated the development of the condition of the aorta. An award was made of £600 and costs.

Practice Notes.

Running-down Action : Insurance Company.

In *Murfin* v. *Ashbridge* (1941), 1 All E.R. 231, the plaintiff had sued A for damages for negligence. A was driving a motor-cycle ; the plaintiff was riding on the pillion ; Martin, the second defendant, was driving a motor car with which the motor-cycle collided. Martin could not be found, and an order was made for substituted service by advertisement in a local newspaper. A conditional appearance, however, was subsequently entered ; no application being made by him to set aside the writ or service, the appearance became unconditional.

Now Martin had not instructed this conditional appearance ; where he was no one knew. The instructions were given by solicitors of the underwriters of his insurance policy under the clause whereby the underwriters' solicitors were entitled to fight the case on the assured's behalf. The next step was an order made by Master Moseley that one, Garthwaite, on behalf of the underwriters, be at liberty to appear on behalf of Martin. There was no need, said Sir Wilfrid Greene, M.R., for such an order, not was it a proper order.

> " If a solicitor enters appearance for a defendant in an action, either he has authority to do it or he has not. If he has not, the appearance can be set aside, and he can be ordered to pay the costs personally. If he has authority to do it, then there is no reason at all for an order of this kind, because the appearance is regularly entered pursuant to the authority of the defendant himself " (at p. 233).

After the master's order, G's solicitors served a notice on the plaintiff's solicitors stating that he intended to apply to the master for an order setting aside the order for substituted service and the service of the writ upon Martin. G, however, not being a defendant, had no *locus standi* to make the application. The master made no order. An appeal from the order—not by Martin the defendant, but by G, who was not a party to the action—came before Stable, J. This appeal, said the Master of the Rolls, should have been struck out. Three months later G appealed *in his own name* against the order, and Wrottesley, J., dismissed his appeal. Both Stable, J., and Wrottesley, J., however—Sir Wilfrid Greene, M.R., continued—appeared to have been under a misapprehension as to the position, for a passage was inserted in the order by consent that G undertook by his counsel and solicitors to enter an appearance forthwith.

From the order of Stable, J., G now appealed. The appeal was struck out as " not competent " ; the original application and the appeal to the judge in chambers should have been struck out. The court made an order for *costs against the solicitors personally* ; against G, not being a party, no order for costs could be made.

Goddard, L.J., pointed out that " this unfortunate story " resulted from " the very simple decision " in *Windsor* v. *Chalcraft* [1939] 1 K.B. 279. There, judgment in default of appearance had been signed against the defendant. The insurance company subsequently applied, as " persons interested," under Ord. XXVII, r. 16, to have the judgment set aside and to be admitted to defend the action *in the name of the defendant*—a right they possessed under the usual terms of such an insurance policy. The present orders, however, were " wholly incompetent " (at p. 235 of (1941), 1 All E.R.).

A useful suggestion, however, for the future conduct of cases of this nature was thrown out by the learned lord justice. He suggested that it might be a proper thing to order *substituted service on a defendant by serving his insurers*—the persons really interested, who, in such an event, would defend the action.

To-day and Yesterday.

Legal Calendar.

17 March.—On the 17th March, 1718, Ferdinando, Marquis of Palleotti, was hanged at Tyburn. His sister had married the Duke of Shrewsbury, but when he visited her in England he drew so deeply on her purse to finance his gambling transactions that at last she had to refuse him further supplies after he had been arrested for debt and she had freed him. After this he was walking in the street one day when he ordered his servant to call on a gentleman in the neighbourhood and ask him for a loan. The servant showed reluctance and the Marquis promptly drew his sword and ran him through. He thought it a great hardship to die for so small a matter as killing his servant.

18 March.—Sir Richard Weston, formerly a Baron of the Exchequer, died on the 18th March, 1651. He was called to the Bar at the Inner Temple, became a judge on the Welsh Circuit in 1632 and was promoted to a place in the Courts at Westminster two years later. In the great Ship Money case he delivered a judgment in favour of the Crown and so when the English revolution came he was one of the six judges impeached by the Long Parliament. Though never brought to trial he was in 1645 disabled by vote of the Commons from being a judge " as though he were dead."

19 March.—Even in the worst days of indiscriminate capital punishment, sentence of death did not necessarily mean hanging, for there was a regular system of reprieves. Thus, on the 19th March, 1779, the King, having considered the report of the Deputy Recorder of London on the last Old Bailey Sessions, thus disposed of the condemned: A coiner, a Jew who had stolen some kitchen furniture and a third man who had stolen some linen and stockings were ordered for immediate execution; seven other prisoners were respited—a house-breaker, a burglar, a horse thief, a servant who had stolen from his mistress a gold slide set with diamonds, a man who had stolen twenty-four pairs of thread stockings, a woman who had stolen some clothes and a man who had robbed a woman of a quantity of linen.

20 March.—Later severity rather increased. Thus, at the last Assizes held at Thetford in Norfolk before the venue was removed to Norwich the judges, Lord Tenterden and Mr. Justice Vaughan, began on the 20th March, 1830, the task of trying forty-four prisoners. Of them twenty were sentenced to death and sixteen actually hanged. Horse-stealing, sheep-stealing, breaking the window of a dwelling-house to steal a cotton shirt and handkerchief—all were visited with the extreme penalty. A boy of sixteen who stole fifty sovereigns at least committed a relatively satisfying offence.

21 March.—John Dickinson, who was sentenced to death for stealing a watchmaker's stock, deserves a place high in the list of notable prison breakers for his escape from Reading Gaol on the 21st March, 1832. He was confined in a cell eleven feet high, lined throughout with whitewashed oak planks two inches thick, the joints being cased with iron. By standing on a stool and using a piece of iron hoop converted into a rough saw he cut a hole in the ceiling. In the daytime he covered up the result of his night's work with a piece of paper, making a sticking paste from wet bread and rubbing the outer surface with chalk from the wall. At last he was able to lift himself under the tiling of the roof, clad only in shirt and stockings, for his clothes had been taken away. He expertly removed a few tiles, emerged on the main roof of the gaol, got over a high and dangerous cross-wall, descended into the garden by a blanket rope, thirty feet long, and so made off.

22 March.—On the 22nd March, 1739, Dick Turpin was tried at York Assizes for stealing a black mare and foal. He was sentenced to death.

23 March.—One of the longest trials in the history of the Liverpool Assizes—it lasted from the middle of February, 1933, till the 23rd March—had other claims to be considered a curiosity. The indictment was of enormous length and contained seventy-five counts, one of which charged four of the prisoners with one of the oldest offences on the statute book, " conspiracy falsely to move and maintain pleas " contrary to an Act passed in the reign of Edward I in 1305. The three who were convicted received sentences ranging from five years' penal servitude to eighteen months' imprisonment.

The Week's Personality.

Dick Turpin, though a bold, bad man, has been endowed by legend with a stature and importance in criminal history far beyond anything that history would justify. Perhaps one of the most remarkable things about him is that after

his death he continued his career of robbery by stealing from an earlier gentleman of the road the credit of the great ride to York, which keeps his memory so green. The son of a small Essex innkeeper, he was born at Hempstead in a house identified with the "Crown" inn, opposite a circle of nine trees known as "Turpin's Ring." He was apprenticed to a Whitechapel butcher, but ended his business career prematurely when he was detected stealing some cattle from a Plaistow farmer. After that he found a more congenial career as a member of a gang of smugglers and deer stealers. The exploits of his friends were not heroic. Attacking lonely farmhouses while the men were away, they would torture the inmates into giving up their valuables. Their enterprises terminated when two of the ringleaders were caught and hanged. Finding himself at a loose end, Turpin then entered into a more restricted partnership with a highwayman called Tom King whom he met on the Cambridge road. Their association was dissolved when Turpin accidentally shot him in an affray with the police. After this misadventure the young man (he was still only thirty-three) retired to Yorkshire where he began a business of horse dealing and horse stealing. It was not very long before he was arrested, tried and hanged. He died bravely.

A Fatal Incident.

This week that ever delightful and varied nocturnal entertainment "Ridgeway's Late Joys" presented, *inter alios et alias*, Mr. Phillip Godfrey in a dramatic and very grim song describing "Samuel Hall's Delinquencies and End." The costume and the whole spirit of the composition, brilliantly rendered, was pure Dickens-Cruickshank, yet Sam Hall died at Tyburn:

"Soon I goes up Holborn Hill,
At St. Giles's takes my gill,
And at Tyburn makes my will."

I should be deeply interested to learn when the verses were written, for I do not know whether Hall be a Victorian literary fiction or a solid fact out of the Newgate Calendar. But if he be the latter he cannot have died later than 1783, for in that year on the 7th November Tyburn saw its last execution when John Austin was hanged for robbing John Spicer and cutting and wounding him in a cruel manner. While the halter was being tied he was violently convulsed and as the noose slipped to the back of his neck he was longer than usual in dying. There is another point too; Hall is described as climbing a ladder at the gallows. Now Tyburn early adopted the method of drawing the cart from under the prisoner so as to leave him dangling, though in the provinces they generally kept to the old method of turning him off a ladder to swing. After Tyburn was abandoned public executions took place at the door of Newgate Gaol, the last there being in 1868.

The Tyburn Trip.

Dr. Johnson regretted the age "running mad with innovation" which dispensed with the Tyburn journey, for, he said, "the old method was most satisfactory to all parties; the public was gratified by a procession; the criminal was supported by it." The departing malefactor might have two consolations on this last journey, a nosegay presented to him at the door of St. Sepulchre's Church and a bowl of ale waiting for him at St. Giles's in the Fields. Between these two lay the long pull up Holborn (pre-Viaduct days), "the Heavy Hill," the road then rising from the present level of Farringdon Street. That procession was essentially of the eighteenth century and no more vivid picture of it exists than Dean Swift's—

"As clever Tom Clinch while the rabble was bawling,
Rode stately through Holborn to die in his calling,
He stopt at the 'George' for a bottle of sack
And promised to pay for it when he came back.
His waistcoat and stockings and breeches were white;
His cap had a new cherry ribbon to tie't.
The maids to the doors and the balconies ran
And said, 'Lack-a-day, he's a proper young man!'
But as from the windows the ladies he spied
Like a beau in a box he bow'd low on each side!
And when his last speech the loud hawkers did cry
He swore from the cart 'It was all a damn'd lie!'"

Compare that with the Old Bailey hanging in the "Ingoldsby Legends" a century later and see how much the procession could relieve a sordid occasion.

Mr. R. Moelwyn Hughes, barrister-at-law and member of Ealing Borough Council, has been selected by the Carmarthen Division Labour Party as candidate for the vacancy caused by the resignation of Major Daniel Hopkin on his appointment as Metropolitan magistrate. Mr. Hughes was called to the Bar by the Inner Temple in 1922, and it is expected that he will be unopposed.

Correspondence.

[*The views expressed by our correspondents are not necessarily those of* The Solicitors' Journal.]

Solicitors' Accounts Rules.

Sir,—The Council of The Law Society have invited observations from solicitors upon their proposed amendments to the Solicitors' Accounts Rules, which were set out in *The Law Society's Gazette* for January. In response to that invitation I have ventured to offer the following suggestions, which you may think fit to publish as being of general interest to the profession.

The primary and very desirable object of the Rules is of course to ensure that in the event of a solicitor's insolvency each individual client's credit shall be "ear-marked," and therefore capable of being held by the court to be impressed with a custodian trusteeship. Confusion however is likely to result from the use in the Rules of the word "money." That word is not juridically appropriate. For the purposes of the solicitor's bank accounts it is important always to bear in mind that the relationship between banker and customer is that of debtor and creditor, giving rise merely to what the lawyer calls a "chose in action." The form of the solicitor's internal books is therefore just as important as the form in which he keeps his banking accounts, in order to ensure that each client's credits shall be ear-marked and that a solicitor shall finance neither himself nor one client at the expense of another.

Once conceded that each individual client's protection against the solicitor's insolvency is the main object to be, and which must be, attained, I have never understood why the Rules seek to forbid a solicitor to have in his client's bank account any credit balance which cannot be ear-marked as due to a specified client. Whilst *deficiencies* must never be permitted I have never been able to perceive any objection to *surpluses* in the bank account beyond those which are necessary to discharge all ear-marked liabilities to clients. For example, I suppose that technically speaking a firm of solicitors would commit a breach of the Rules as they stand and as they are proposed to be amended if the firm treated a partner as a client for the purpose of receiving his money in client's account in order to complete a purchase of property for that partner, although that would seem to be the most convenient form in which to carry through such a transaction.

Under r. 4 as proposed to be amended there must always be an interval of time during which a solicitor would be committing a breach, for, if in any considerable practice, he can hardly be expected to make an *immediate* transfer from client's account to professional account at the very moment of delivering each bill absorbing the whole or part of a credit against sums received on account of costs not actually incurred at the moment of receipt.

In my own case, it is my practice for all moneys received from clients on account of costs to be paid into client's account to the credit of the client making the payment and for disbursements therefrom for counsel's fees, stamp duties, death duties, etc., to be drawn on client's account to the debit of the individual client. I could hardly, however, be expected to send an intimation to the client on each such disbursement for his account as apparently (*d*) of r. 4 would now require.

Moreover, my stringent internal audit system provides that no money is to be transferred from my client's account to my professional account until after certification by my auditors following quarterly audit. These transfers are certified to me in a quarterly schedule on the quarterly audit and the auditors examine the state of each client's account and the bills which have been delivered and agreed before certifying the amount properly to be transferred from client's account to professional account. Thus there is always a certain time lag between the delivery and agreement of the bill and the quarterly transfer of the appropriate amount from client's account to professional account. Is not this method preferable to the solicitor himself deciding when money paid on account of costs can be transferred from client's account to professional account?

If these observations are well founded, then the Council's object would be attained by re-drafting r. 4, as follows:—

4. No cheque shall be drawn by a solicitor upon his client bank account except for:—

(*a*) Payments for the making of which each individual client's credit was established, or

(*b*) Payment of the solicitor's professional charges and disbursements pursuant to and up to the amount of a bill of costs or other note of charges in respect thereof duly delivered to the client and either agreed by him or followed by the expiry of one month from such delivery without objection by the client, and to the extent to which there is a credit balance in that client's

account capable of being appropriated to or towards payment of such bill or note and shown as a credit thereon.

Long consideration of the problem has convinced me that a great deal of the trouble in which certain solicitors become involved is due to their failure to ear-mark *ab initio* precise details of all receipts and all payments. This difficulty could easily be overcome if solicitors are advised and, if necessary, compelled to insert on the counterfoil of every cheque and every receipt which they issue the appropriate particulars under the following headings :—

Name of Client .....
Name of Matter .....
Paid to (or received from) .....
For .....
Client's A/c (or Professional A/c) .....
Amount £ .....

Such details would then constitute the foundation for every entry in cash book, journal and ledger and no solicitor could any longer remain in doubt as to the true state of his financial accountability to each client.

London, E.C.4. 6th March. CHARLES L. NORDON.

Books Received.

The Conveyancers' Year Book, 1941. Vol. 2. By Sir LANCELOT H. ELPHINSTONE, of Lincoln's Inn, Barrister-at-Law. Demy 8vo. pp. xxxvi and (including Index) 260. London : The Solicitors' Law Stationery Society, Ltd. Price 15s. net.

The Juridical Review. March, 1941. Vol. LIII. No. 1. Edinburgh : W. Green & Son, Ltd. Price 5s. net.

Excess Profits Tax. By CYRIL L. KING, K.C., of the Middle Temple, and MICHAEL MOORE, F.I.C.A. 1941. Royal 8vo. pp. xxxiv and (including Index) 403. London : Butterworth and Co. (Publishers), Ltd. Price 45s. net.

Obituary.

MR. E. BECK.

Mr. Egerton Beck, barrister-at-law, died on Sunday, 9th March. He was called to the Bar by Lincoln's Inn in 1896.

MR. W. G. BRADSHAW.

Mr. William Graham Bradshaw, C.B.E., solicitor, of Messrs. Richard Bradshaw & Son, solicitors, Moorgate Station Chambers, London, E.C.2, died on Sunday, 16th March, at the age of seventy-nine. Mr. Bradshaw was admitted a solicitor in 1888, and for forty-eight years was Deputy Chairman of the Midland Bank.

MR. S. N. EVANS.

Mr. Stuart Newton Evans, solicitor, of Bargoed, died on Monday, 10th March, at the age of thirty-four. He was admitted a solicitor in 1929.

MR. M. W. STIKEMAN.

Mr. Mervyn Walter Stikeman, solicitor, of Messrs. Stikeman and Co., solicitors, of 71A, Queen Victoria Street, London, E.C.4, died on Tuesday, 11th March, at the age of seventy-eight. He was admitted a solicitor in 1885.

Parliamentary News.

PROGRESS OF BILLS.

HOUSE OF LORDS.

Air-raid Precautions (Postponement of Financial Investigation) Bill [H.C.].
Read Third Time. [18th March.

Determination of Needs Bill [H.C.].
Read First Time. [13th March.

Land Drainage (Scotland) Bill [H.C.].
Amendments reported. [18th March.

Liabilities (War-Time Adjustment) Bill [H.L.].
Read First Time. [13th March.

Ministry of Health Provisional Order (Shipley) Bill [H.C.]
Read Second Time. [12th March.

Public and Other Schools (War Conditions) Bill [H.L.]
In Committee. [18th March.

War Damage Bill [H.C.].
Read Third Time. [18th March.

HOUSE OF COMMONS.

Land Drainage Provisional Order Bill [H.C.]
Read Second Time. [12th March.

Notes of Cases.

HIGH COURT—CHANCERY DIVISION.

Plomien Fuel Economiser Company, Ltd. *v.* National Marketing Company.

Morton, J. 5th February, 1941.

Evidence—Employee of plaintiff company signs proof of evidence he proposed to give—Dies before action—Whether proof admissible in evidence—Employee "person interested" in dispute—Evidence Act, 1938 (1 & 2 *Geo.* 6, *c.* 28), *s.* 1 (1) (3) (4) (5).

Passing-off action.

The plaintiff company in this action alleged that the defendant company had passed off its own fuel economiser as and for the fuel economiser of the plaintiffs. The plaintiff company tendered in evidence a proof taken from and signed by one P, who had been employed by them as a tester. The proof was made when the action was pending. P died before the hearing. The Evidence Act, 1938, s. 1 (1), provides that in any civil proceedings, where direct oral evidence of a fact would be admissible, any statement made by a person in a document tending to establish that fact shall be admissible as evidence of that fact, provided the maker had personal knowledge of the matters dealt with and if he is called as a witness in the proceedings. The latter condition need not be satisfied if he is dead. Subsection (3) provides "Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish."

MORTON, J., said that "a person interested" in subs. (3) of s. 1 must mean a person interested in the result of the proceedings "pending or anticipated." Applying that test, was P a person interested? The object of the action was to prevent the plaintiffs' trade from being damaged by unfair competition. It must be to P's advantage as tester to the plaintiffs that their business should increase—as their business grew his importance to the plaintiffs would grow. He was therefore "a person interested" within subs. (3). In the case of a company it would seem that every shareholder and every director was "a person interested" in the success of proceedings brought by the company. It might be that in some circumstances a servant of the company would not be a person interested. The general intention of the section was that, if a written statement was put in as evidence, to which, of course, no cross-examination would be directed, it should be a statement made either at a time when proceedings were not pending or anticipated involving a dispute as to any fact which the statement might tend to establish, or a statement made by what might be conveniently described as an independent person. The document tendered in evidence was accordingly not admissible in evidence under s. 1.

COUNSEL : *Shelley*, K.C., and *Aldous* appeared for the plaintiff company ; *G. H. Lloyd Jacob*, for the defendant company.

SOLICITORS : *Simon, Haynes, Barlas & Ireland ; Rowley, Ashworth and Co.*

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

***In re* Mylne ; Potter *v.* Dow.**

Farwell, J. 17th February, 1941.

Will—Construction—Gift for benefit of persons engaged in evangelistic work—No person eligible unless a "Protestant in religion and a wholehearted believer in the Deity of Christ and the full inspiration of Scripture"—Whether good charitable gift.

Adjourned summons.

The testatrix, who died in 1940, after making certain provisions for the founding of a museum in Hammersmith and declaring certain trusts of land in Hertfordshire, by cl. 11 directed her trustees to apply the residue of her residuary trust fund and the income thereof "for the benefit of such persons of either sex and who are or have been engaged in evangelistic work, including retired missionaries or missionaries still engaged as such or continuing Christian workers of any other description as my trustees in their absolute discretion shall from time to time select and in such shares and proportions and such manner in all respects as my trustees in such discretion shall from time to time think fit. It is my wish but without imposing any trust that preference shall be given to such persons as may be residing in Guildford and the neighbouring district but so that no person shall be eligible for any benefit under this trust unless he or she shall be a Protestant in religion and a wholehearted believer in the Deity of Christ and the full inspiration of Scripture." This summons was taken out by the executors of the will (*inter alia*) for the determination of the question whether cl. 11 created a valid charitable gift.

FARWELL, J., said that the conditions in the gift in cl. 11 raised difficulties. The provision that "no person shall be eligible for any benefit under this trust unless he or she shall be a Protestant in religion and a wholehearted believer in the Deity of Christ and the full inspiration of Scripture" seemed to him not merely to be expressive of a wish, but to indicate that a person to be eligible for benefit under this trust must be a person who was correctly described by those words. It was argued that this condition was one which it was impossible for

the trustees to carry out, because it was not possible to know if any person was a wholehearted believer, as required by the testatrix, since belief depended on the state of a person's mind. The decisions of himself and Morton, J., in *In re Blaiberg; Blaiberg and Public Trustee* v. *De Andia Yrarrazaval and Blaiberg* [1940] Ch. 385, 84 Sol. J. 287, were cited in support of that contention. Those decisions, however, were not in point. This was not the case of a forfeiture clause, which must be construed strictly and where the persons seeking the benefit of the operation of the clause must show that it was valid. In the present case, all that was required was that the trustees should make a selection amongst certain classes of persons and in so doing they must satisfy themselves that such persons complied with the conditions laid down by the testatrix. If they made their selection honestly and with care nobody could complain. Therefore cl. 11 constituted a valid and effective charitable trust.

Counsel: *Danckwerts; H. A. Rose; Jopling; W. G. Hart; Hewins.*

Solicitors: *Johnson, Weatherall, Sturt & Hardy*, for *Potter, Crundwell & Bridge*, Farnham; *Ford, Harris & Co; Rivington & Son; Treasury Solicitor.*

[Reported by Miss B. A. Bicknell, Barrister-at-Law.]

In re Ward; Public Trustee *v.* Ward.

Farwell, J. 14th February, 1941.

Will—Construction—Gift for furtherance of "educational or charitable or religious purposes for Roman Catholics"—Whether good charitable gift.

Adjourned summons.

The testator, who died in 1940, gave the residue of his estate to his trustees upon trust for sale and conversion, and after payment of debts he directed his trustees to stand possessed of the residue of the proceeds of such moneys "in trust to pay and transfer the same to the Archbishop of Westminster or other the Head of the Roman Catholic Church in England for the time being upon trust that he shall forthwith in his absolute discretion devote the same to the furtherance of educational or charitable or religious purposes for Roman Catholics in the British Empire in such manner in all respects as he may think fit." The Public Trustee, as trustee of the will, by this summons asked whether the gift of residue in cl. 11 . . . constituted a good charitable gift.

Farwell, J., said that the difficulty here was that, while the testator had used the word "charitable," which standing alone would be sufficient to make a good charitable gift, he had coupled with it the two words "educational" and "religious," having in each case inserted the word "or." *Prima facie* the word "or" was not a conjunctive word. There was nothing in the will to denote any general charitable intention. That being so, the question was whether under the language of the gift the money could be applied for purposes which were not strictly charitable. The furtherance of educational purposes was *prima facie* "charitable," and it was not put outside that category because it was contrasted with "charitable." The words "religious purposes" were more difficult to construe. The authorities showed that "religious purposes" were not necessarily charitable (*In re Davidson, Minty* v. *Bourne* [1909] 1 Ch. 567; *Farley* v. *Westminster Bank, Ltd.* [1939] A.C. 430). The words were wide enough to embrace purposes which were not charitable. The gift accordingly was void for uncertainty and failed.

Counsel: *Vanneck; H. M. Cross; Pennycuick; C. C. Dare* (for *R. Edward*, on war service); *Wynn Parry*, K.C., and *H. E. Salt; Danckwerts.*

Solicitors: *Walter Crimp & Co.*, for *Harold Michelmore & Co.*, Newton Abbot; *Witham & Co.; Treasury Solicitor.*

[Reported by Miss B. A. Bicknell, Barrister-at-Law.]

HIGH COURT—KING'S BENCH DIVISION.

R. *v.* Hereford Licensing Justices, *ex parte* Newton.

Viscount Caldecote, C.J., Hawke and Humphreys, JJ.
15th October, 1940.

Licensing—Sunday observance—Premises licensed for public dancing—Dancing on Sundays excepted from licence—Justices' order removing exception—Validity—Sunday Observance Act, 1780 (20 *& 21 Geo. 3, c. 49*), *s. 1—Public Health Acts Amendment Act*, 1890 (53 *& 54 Vict., c. 59*), *s. 51.*

Motion for an order of *certiorari*.

By a licence dated the 13th February, 1940, Hereford licensing justices authorised the use of a building in the City of Hereford for the purpose of public dancing, singing and musical or other public entertainments of like kind, subject to the restriction, among others, that the building "shall not be opened under this licence on Sundays, Good Friday and Christmas Day." Certain proceedings having been taken against the occupier of the premises for having used the building in breach of that condition, he applied to the magistrates for a variation of the existing licence by removing the restriction on the use of the building for dancing on Sundays. The application was opposed by the police, who objected that there was no power in the justices to grant a licence for public dancing on Sundays. The justices having made an order amending the licence by deleting from it the restriction on public dancing on Sundays, the Chief Constable of Hereford made the present application. The chairman of the justices stated in an affidavit that the justices were actuated by the view that pubile dancing could be allowed on Sundays as a musical entertainment.

Viscount Caldecote, C.J., said that the question whether any breach of the licence had taken place, or whether the entertainment which had taken place on a Sunday was a musical entertainment or public dancing, was not before the court. The sole question for decision was whether the justices had power to grant a licence for public dancing on Sundays. The legislation to be considered began with the Sunday Observance Act, 1780, s. 1 of which provided: ". . . any house, room, or other place which shall be . . . used for public entertainment . . . upon any part of the Lord's Day called Sunday, and to which persons shall be admitted by the payment of money . . . shall be deemed a disorderly house or place." That had the effect of making it illegal to grant a licence for public dancing on Sunday. The Sunday Entertainments Act, 1932, gave no power with reference to public dancing on Sundays. There was, therefore, no answer to the applicant's contention that the justices had no power to remove the restriction contained in the original licence; for they had no power to grant a licence for public dancing on Sundays. If they had no such power, it was clear that they also had no power to remove the restriction against public dancing on Sundays which was contained in the original licence. The order applied for must be made.

Hawke, J., agreed.

Humphreys, J., also agreeing, said that the application to the justices was in the terms of s. 51 of the Public Health Acts Amendment Act, 1890. The justices might well have read that Act as enabling them to grant a licence to any person they might think fit to keep a house for the purpose, among other things, of public dancing, etc.; but when that Act was passed there was in force, as there still was now, the Act of 1780. Section 51 of the Act of 1890 must be read with the old Act, and therefore never purported to empower the granting of a licence for public dancing on Sundays.

Counsel: *Done*; there was no appearance by or for the respondent.

Solicitors: *Sharpe, Pritchard & Co.*, for *The Town Clerk*, Hereford.

[Reported by R. C. Calburn, Esq., Barrister-at-Law.]

Bury *v.* Epping Rural District Council and Others.

Viscount Caldecote, C.J., Hawke and Humphreys, JJ.
5th November, 1940.

Acquisition of Land (Town Planning)—Compensation—Injurious affection of land—Resolution to construct a road before town planning scheme in operation—Whether compensation payable either then or after sale of land affected—Town and Country Planning Act, 1932 (22 *& 23 Geo. 5, c. 48*), *s. 18 (1).*

Special case stated by an official arbitrator under s. 6 (1) of the Acquisition of Land (Assessment of Compensation) Act, 1919.

In July, 1937, Epping Rural District Council passed a resolution under the Town Planning Act, 1925, to prepare a scheme in respect of land in their district, the resolution taking effect on being approved by the Minister of Health. In September, 1930, the council resolved to provide in the scheme for the reservation of land in their district for a public road. The Act of 1925 was subsequently replaced by the Town and Country Planning Act, 1932. In July, 1936, the council relinquished to the Essex County Council their powers and duties relating to the preparation of a planning scheme under the Act of 1932, the resolution of 1927 being replaced by one of the county council. In October, 1938, the county council by resolution made a new scheme which was submitted to the Minister for approval in February, 1939. The land reserved for the road included land owned by the claimant, who claimed £533 10s. from the county council as compensation for restriction on development of his land from October, 1930 (when the land was first reserved) to the 31st January, 1939, when the land was sold to the Minister of Transport. The sale came to be made in the following circumstances: Considering his land to be ripe for development, the claimant, on the 21st February, 1935, applied under s. 10 of the Act of 1932 to the rural district council for permission to develop the land, which was refused. In March, 1935, the claimant appealed to the Minister of Health under s. 10 (5). He sold the land to the Minister of Transport for £1,425 on the 31st January, 1939, whereupon the Minister of Health formally dismissed the appeal. In April, 1939, work was begun on the road. The claim having been referred to the official arbitrator, he was satisfied (1) that the resolution to prepare a scheme injuriously affected the claimant's land; (2) that the land was ripe for development in 1932; and (3) that during that year the claimant could have obtained £1,425 for it. The arbitrator assessed compensation at £500, subject to the questions left to the court (1) whether a provision in a scheme had come into operation within the meaning of s. 18 of the Act of 1932 by reason of the resolution to prepare a scheme or of the marking of the road on the draft scheme map; and (2) whether the claimant would be entitled in law to be compensated when the scheme was finally approved and its provisions came into operation, notwithstanding that he would not then own the land. By s. 18 of the Act of 1932, " . . . any person (*a*) whose property is injuriously affected by the coming into operation of any provision contained in a scheme . . . shall . . . be entitled to recover" compensation. (*Cur. adv. vult.*)

VISCOUNT CALDECOTE, C.J., discussing the arbitrator's first question, said that before a scheme could come into operation certain conditions prescribed by the Act had to be fulfilled. Part II of the First Schedule provided that the scheme should become operative six weeks from the date of publication of a notice "that the scheme . . . is capable of coming into operation." The "provision" said to have injuriously affected the claimant's land was the reservation of the land for the proposed road, and it was argued that it came into operation within the meaning of s. 18 notwithstanding that the scheme itself had not reached the final stage or come into operation. The scheme had still not been finally approved by the Minister. Section 18 read alone might bear the claimant's interpretation, but he (his lordship) thought that the county council were right in contending that the words must be read as only applying to a case where the scheme itself had come into operation. The effect of s. 18 (2) was that if, in addition to an injury caused by a provision contained in a scheme which had come into operation, the landowner had suffered additional injurious affection because he had been refused an interim development order, account must be taken of that also in awarding him compensation under s. 18 (1) (*a*). The next question left by the arbitrator must also be answered in the negative. If the point of time at which a right to compensation for injurious affection under s. 18 arose was the coming into operation of the scheme, it seemed to follow that only a claimant who owned the property affected by the coming into operation of the scheme could claim the compensation given by s. 18 (1) (*a*). The result was not, as had been argued, that no compensation was given for a clear injury; the claimant might have remained the owner of the land. If, however, he chose to sell before the scheme came into operation, the price obtained would presumably reflect the compensation likely to become payable.

HAWKE, J., dissenting, said that it was not disputed that there had been injurious affection. Were the county council to escape liability for it merely because at the moment of making his claim the claimant could no longer say that he was the owner of the land? The Act of 1932 should be construed in the light of *Attorney-General* v. *Horner* (1884), 14 Q.B.D. 245, followed in *Bond* v. *Nottingham Corporation* [1940] 1 Ch. 429; 84 SOL. J. 233. In his opinion, the landowner did not lose his rights by parting with the land. Section 18 referred not to the completion of the whole scheme, but to the time when the injurious affection took place.

HUMPHREYS, J., agreed with the Lord Chief Justice.

COUNSEL: *Montgomery*, K.C., and *T. Dawson* (for *Bowyer*, on war service); *H. B. Williams*.

SOLICITORS: *Montagu's and Cox & Cardale*; *Sharpe, Pritchard & Co.* for *The Clerk to the Essex County Council*.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

O'Brien *v.* E. W. Perry and Daw.

Atkinson, J. 21st November, 1940.

Arbitration—Sale of public-house—Valuation of furniture and fittings—Plaintiff purchaser's valuer acting also for vendor—Negligent over-valuation—Valuer in position of quasi-arbitrator—Plaintiff's claim for damages not maintainable.

Action for damages for negligence.

The plaintiff, having agreed to buy a certain public-house, employed the defendants, who had often acted for him before, to value the fittings, trade utensils and staff-furniture which were to be taken over from the tenant. The defendants, with the plaintiff's consent, were acting also for the tenant, and they made a valuation amounting to £563. The plaintiff, although considering that figure very high, paid it and took possession. Eighteen months later, when he had spent £130 on additional fittings, he agreed to sell the premises. He again employed the defendants as valuers, the purchaser appointing his own. The defendants made a valuation amounting to £660, but the purchaser's valuer arrived at the figure of £434. The purchaser's valuer considering that the disparity was too great for discussion, an umpire was appointed, whose valuation was £453, and who charged a fee of which the plaintiff's share came to £14 2s. The plaintiff accordingly brought this action alleging negligent over-valuation by the defendants both when he bought and when he sold the premises, by reason of which in the first case he paid £200 more than he should have paid, and in the second case he had to pay £14 2s. in respect of the umpire's fee.

ATKINSON, J., said that the defendants' first point was that in the first valuation their representative was in the position of a quasi-arbitrator, and therefore that no action lay against them, however negligent they were, in the absence of collusion or fraud. In *Chambers* v. *Goldthorpe* [1901] 1 K.B. 624; 17 T.L.R. 304, it was held (Romer, L.J., dissenting) that an architect employed by a building owner, in ascertaining the amount due to the contractor and certifying in respect of it under the contract, occupied the position of an arbitrator and was not liable to an action by the building owner for negligence in the exercise of those functions. Several passages in the judgments made clear the principle to be applied in determining whether a valuer was in the position of a quasi-arbitrator. The Master of the Rolls said ([1901] 1 K.B., at p. 634) that under the clause in the building contract under which the architect acted he was to act impartially towards builder and building owner, his duty being that of "holding the scales even" and deciding impartially the amount payable by the one to the other. He was in the position of an arbitrator inasmuch as he was a person by whose decision two parties having a difference had agreed to be bound. A somewhat similar case was *Boynton* v. *Richardson* (1924), 69 SOL. J. 107. It seemed clear that the defendants in the present case were bound to hold the scales evenly between the plaintiff and the other party. Counsel for the plaintiff sought to establish a distinction by saying that the history of the defendants' relations with the plaintiff must be considered. They were employed by him, it was said, to act as his agents, and the terms of their employment were not affected by the fact that it was agreed in a certain instance that they should act also for the vendor. The plaintiff, however, had agreed to the defendants' acting for both sides, and had effected a saving in valuation fees as a result. The first claim therefore failed. His lordship having held, on a detailed review of the facts and evidence, that the defendants' valuations were both grossly excessive, and negligently made, said that, *prima facie*, the £14 2s. expenses incurred by the plaintiff as the result of the second negligent valuation were recoverable by him as damages. The defendants had, however, argued that that sum was not recoverable, because an equal disagreement between themselves and the other valuer might have arisen even if there had been no negligence on their part. That was fallacious: normally valuers undoubtedly did come to an agreement in cases of this kind. Were it otherwise, parties would eliminate preliminary valuations by their own agents, and would at once agree to a valuation by a third party. It was no answer for a motorist who had knocked down a pedestrian through driving negligently to say that he might also have knocked him down if he had been driving carefully. There must be judgment for the plaintiff for £14 2s.

COUNSEL: *Fox-Andrews*; *Laskey* (for *Thorold Rogers* on war service).

SOLICITORS: *A. H. Page*; *Hair & Co.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

S. C. Taverner & Co., Ltd. *v.* Glamorgan County Council.

Humphreys, J. 18th December, 1940.

Contract—Building—Extras to be ordered in writing—Extra work done without written order—Builder not entitled to payment—Procedure—Preliminary issue—What materials necessary for court—R.S.C., Ord. XXV, r. 2.

Preliminary issue directed to be tried under R.S.C. Ord. XXV, r. 2.

The plaintiffs, a company of building contractors, claimed from the defendant county council £10,778, alleged by them to be "extras as per account delivered." The items in question were alleged to be extras to a contract under which the plaintiffs did certain erecting work for the defendants, and related principally to "extra cost of stone facings." The plaintiffs alleged that instructions for the extras were given by the defendants' clerk of works to the plaintiffs' managing director, no price for the additional work being expressly agreed; but they contended that there was an implied agreement by the defendants to pay a reasonable price for the extra works so ordered. The building contract provided, *inter alia*, "the contractor shall execute all alterations and additions which shall be ordered by the county surveyor, but if the contractor shall be of the opinion that any such alterations and additions will cause additional expense, he shall not be bound to execute the same without an order in writing signed by the clerk of the county council stating the price which is either agreed or certified by the county surveyor to be the proper sum to be allowed for the same . . ." There was also provision for express waiver in writing of that clause. The defence to the claim, so far as material, was that the items alleged by the plaintiffs to be extras were not authorised by them in accordance with the above provision in the contract. The question was accordingly referred to the court, to be decided as a preliminary issue of law, whether the plaintiffs were entitled, in the absence of any order or waiver in writing, or of any agreement as to price, to recover anything in respect of the alleged extras. The reference was made by order of the master at the instance of the defendants.

HUMPHREYS, J., said that the cases in which Ord. XXV, r. 2, could be invoked must necessarily be rare: it was seldom that the facts were so clearly stated in the pleadings as here, where they were supplemented by the clear language of a written contract. Counsel for the plaintiffs had argued that the master's order for the trial of the preliminary issue had been misconceived because it was plain, on the pleadings and the contract, that other facts would have to be known to the court before it could decide the question raised. The plaintiffs, however, had not availed themselves of the opportunity which they had under the rules of appealing against the master's order. Counsel referred to many matters on which evidence might have to be given at the trial of the action, and said that it would have to go before an Official Referee. The question, however, was whether there were other relevant matters which the court required to know before it could decide the preliminary question. The law on that subject was accepted as having been correctly laid down by Roche, J., in *Isaacs & Sons* v. *Cook* [1925] 2 K.B. 391, at p. 401, where he reserved for decision as a preliminary issue "only . . . those matters which, as it seems to me, can have no further light thrown upon them by a trial." What the objecting party had to establish was that the evidence which would be

given at the trial would be admissible on the pleadings; that there were evident on the pleadings matters of fact which might affect the decision of the court on the point of law. On the issue itself, it would seem that the parties had contracted on the plainest possible terms, both being familiar with contracts of the kind in question. The plaintiffs' answer to the defendants' reliance on the material provision in the contract was that there were many circumstances in which parties entered into such a contract who, in spite of the term that extras should not be paid for unless ordered in writing, yet were obliged in fact and in law to pay for any extras supplied; an example was where the extras really consisted of work lying outside the contract work. That, however, was not the case here, where the main extra was an order to dress with a more expensive kind of stone. Counsel further argued that the law on the point had been plain for many years and that no one had thought before the present case that any attention should be paid in such circumstances to the stipulation for written orders. He relied on a passage from "Hudson on Building Contracts" (4th ed., at p. 313), based on two cases widely different from the present. In *Molloy* v. *Liebe* (1910), 102 L.T. 616, where the same clause appeared, there was a dispute whether the works in question were or were not an extra, and for that reason no order in writing was given. It was held that the umpire was entitled to infer that the employer, in giving the order in the face of the dispute, had impliedly promised that the works should be paid for either because included in the contract price (as he maintained) or because they were extra. If such a dispute had arisen here, the court could not have decided the case on a preliminary point. In *Hill* v. *South Staffordshire Railway* (1865), 12 L.T. 63, the court had come to the conclusion on the facts that it would have been fraudulent to refuse to pay for the alterations. Here the court had no knowledge of why the council were refusing to pay. *Kirk* v. *Bromley Union* (1848), 17 L.J. Ch. 127, was interesting as having come before the Lord Chancellor. He decided that the clause defeated the claim in respect of extras, and, dealing with a claim based on equity, said that the mere inability to enforce a legal debt at law did not give the party a remedy in equity; an attempt was being made to make the want of writing the ground of equitable jurisdiction. That case strengthened his (Humphreys, J.'s) opinion that the preliminary issue must be decided against the plaintiffs' claim.

COUNSEL: *Creswell*, K.C., and *Hynes*; *Roberts*, K.C., *Gumbel* and *Miss D. C. Spickett*.

SOLICITORS: *Walter Crimp & Co.*, for *David Morris*, Newport (Mon.); *Torr & Co.*, for *The County Solicitor*, Cardiff.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Societies.

Birmingham Law Society.

The committee of the Birmingham Law Society had pleasure in presenting the 122nd annual report of the proceedings of the Society at the annual general meeting held at the Law Library, Birmingham, on Wednesday, 19th March.

At the January meeting of the committee Mr. J. T. Higgs was again chosen President, Mr. G. H. Willcox Vice-President, and Mr. G. C. Barrow, Mr. J. F. Crowder and Mr. Wilfrid C. Mathews Joint Honorary Secretaries and Treasurers.

The membership of the Society showed a decrease of seven as compared with last year. Two members had resigned, eight had died and three members had been elected: the number on the register on the 31st December, 1940, was 459.

The City Council had elected Colonel Wilfrid Martineau to be Lord Mayor of Birmingham for 1940–41, and the committee had prepared an illuminated address which had been presented to him. Mr. J. E. Larkham, of Oldbury, had also been elected Mayor of Oldbury.

The income and expenditure account showed an excess of expenditure over income of £360 18s. 6½d. after placing £500 to a reserve for depreciation of premises and £100 to a reserve for repairs and contingencies. The deficit was due to a great reduction in the sale of conditions and a fall in subscriptions which could not be wholly met by economies; the position, however, was not unsatisfactory in the circumstances.

The number of books issued by the library during the year was 2,000 less than the previous year.

New editions of all the important text-books and volumes of precedents had been acquired and copies of many of these had been added to the reference section.

At a conference of representatives of Provincial Law Societies on the 9th January, 1940, the Council of The Law Society submitted a report containing the following proposals:—

(1) That every practising solicitor, when applying for his practising certificate, shall submit a certificate signed by an accountant that the professional books of such a solicitor have been examined and have been kept in accordance with the Solicitors' Accounts Rules made under the Solicitors Act, 1933.

(2) That a relief fund should be formed for the benefit of clients who have suffered by the default of their solicitor, and that each practising solicitor should be required to contribute a sum of not more than £5 per annum to such fund.

This was approved by a large majority, and it was agreed that a Bill incorporating the proposals should be promoted.

A special meeting of Birmingham Law Society was held on the 14th February, when the President and Mr. L. Arthur Smith and Mr. Pettitt explained these proposals to the meeting.

It was resolved with one dissentient that this meeting of members of the Birmingham Law Society supported the proposals of the Council of The Law Society with regard to defalcations by solicitors, with the amendment that the same be brought into force as soon as practicable after the necessary Act had been passed.

Early in 1940 the National Council of Social Service established throughout the country about 900 citizens' advice bureaux. The members responded to an appeal made on behalf of the committee and the latter was able to give valuable assistance in forming a rota of solicitors to whom cases could be referred.

The Council of The Law Society in July circulated a scheme for the improvement of legal aid to those who could not afford to pay proper legal charges, which scheme provided for payment of small fees in certain cases.

The committee of the Birmingham Law Society had arranged to send representatives to a joint meeting of the Poor Persons Committee, the Poor Man's Lawyers' Association and the National Council of Social Service to discuss generally the problem of legal aid in Birmingham.

The library had suffered some damage as a result of enemy action and a number of solicitors had to evacuate their offices owing to war damage.

A circular was sent out asking for particulars from those who could offer temporary office accommodation to other solicitors, and some offers were received. Any member who might at any time be in difficulty over accommodation should therefore apply to the Hon. Secretary. The library premises and the services of the library staff were at the disposal of any member who had to vacate his office in consequence of enemy action.

Neither solicitors nor their clerks were included in any schedule of reserved occupations. In May, 1940, the Minister of Labour received a deputation from The Law Society which asked that certain reservations should be placed upon the calling up of solicitors and their clerks. In consequence of this deputation, the Minister of Labour agreed that representations might be made to him by the Lord Chancellor for the postponement of military service of any solicitor or clerk whose services were considered essential for the administration of justice.

To implement this suggestion a military service (deferment) committee was set up by The Law Society and in various provincial centres panels were constituted to interview applicants. These panels had power to recommend deferment of military service for a period of six months after which a further recommendation could be made. A panel of this nature had met regularly in Birmingham.

The committee nominated under the Poor Persons Rules, 1925, had continued to carry on their work during the year.

One meeting of the full committee was held during the year, and thirty-nine meetings of the rota members.

The number of applications for certificates had been unchanged by the war, but the work of the committee had practically come to a standstill, due to the impossibility of obtaining counsel for divorce cases. With one or two exceptions, the few cases which had been sent out had been to solicitors who were able to make their own arrangements for counsel.

Applicants had to be informed that it would be nearly two years before their case would be sent out to a solicitor. Very few applications were withdrawn on this account, which definitely showed that the applicants were quite unable to take divorce proceedings in any other way. It would be very helpful if it could become widely known that a poor persons divorce takes so long, as it was a severe shock to a great many applicants. No difficulty was anticipated with regard to the number of solicitors on the rota.

The committee had sent a letter to all members of the Bar practising in Birmingham urging them to accept poor persons divorce cases. The response to this letter had not, however, materially improved the situation.

The committee foresaw a difficulty in the alteration in the means of applicants between the date of the grant of the certificate and reference to a solicitor, and had arranged for a circular letter to be sent out with every case to the conducting solicitor asking him to inquire as to the applicant's means at the time the case was sent to him and to return the papers if these were too high.

There had been few cases of outstanding interest during the year, but in one running-down action, where there were no less than nine defendants to the writ, a settlement of £125 was arrived at, with the approval of the court. At the time such approval was given, the master awarded the conducting solicitor party and party costs. The committee continued to do a great deal of valuable work in many cases where no certificate was ever granted.

In conclusion, the committee wish to thank the members of both branches of the profession who had helped during the year.

The Birmingham Poor Man's Lawyers' Association was entirely independent of the poor persons committee and of the Birmingham Law Society. The main object of the association was to give free legal advice to those who could not afford to consult a solicitor in the ordinary way. The association was now operating from one centre

only at the Central Hall and was desperately short of consultants as the younger solicitors who did a great deal of this work were now on active service.

War Legislation.

(*Supplementary List, in alphabetical order, to those published week by week in* THE SOLICITORS' JOURNAL *from the 16th September, 1939, to the 15th March, 1941.*)

STATUTORY RULES AND ORDERS, 1941.

E.P. 296. **Bacon** (Prices) Order, March 5, 1941.
E.P. 303. **Canned Fruits** (Maximum Prices) Order, 1941. Amendment Order, March 5, 1941.
E.P. 325. **Cocoa Butter** (Maximum Prices) Order, March 12, 1941.
E.P. 268. **Cold Storage** (Control of Undertakings) (Charges) (No. 2) Order, February 28, 1941.
E.P. 307. **Defence Areas Order,** March 7, 1941.
E.P. 344. Defence (St. Patrick's Day Holiday) Regulations, 1941. Order in Council, March 14, 1941.
E.P. 304. **Emergency Powers** (Defence) Road Vehicles and Drivers Order, March 1, 1941.
E.P. 302. **Essential Work** (General Provisions) Order, March 5, 1941.
No. 282. **Export of Goods** (Control) (No. 8) Order, March 5, 1941.
No. 309. Export of Goods (Control) (No. 10) Order, March 10, 1941.
No. 308. Export of Goods (Control) (No. 9) Order, March 12, 1941.
E.P. 299. **Food.** Rationing Order, 1939. Directions, January 6, 1940. Amendment Order, March 5, 1941.
E.P. 310. Food (Restrictions on Meals in Establishments) Order, 1941. Amendment Order, March 8, 1941.
E.P. 324. **Growing Trees** (Delegation of Functions) Order, 1940. Revocation Order, March 12, 1941.
E.P. 319. **Home Grown Wheat** (Control) Order, March 11, 1941.
E.P. 320. **Limitation of Supplies** (Miscellaneous) (No. 5) Order, 1940. General Licence, March 10, 1941.
E.P. 298. **Local Authorities** (Directions to Caterers) Order, March 5, 1941.
No. 306. **Merchant Shipping** (Additional Life-Saving Appliances) (No. 3) Rules, March 6, 1941.
E.P. 316. **Merchant Ships** (Accommodation for Defence Personnel) Order, March 10, 1941.
E.P. 327. Merchant Ships (Defence and Safety) Order, March 15, 1941.
E.P. 326. Merchant Ships (Fire Fighting) Order, March 15, 1941.
E.P. 287. **Milled Wheaten Substances** (Restriction) Order, 1940. General Licence, March 4, 1941.
No. 291. **Motor Vehicles** (Definition of Motor Cars) Regulations, February 26, 1941.
No. 292. **National Health Insurance** (Seamen's Medical Benefit) Amendment Regulations, February 17, 1941.
E.P. 317. **Potatoes (1940) Crop** (Control) Order, 1940. Amendment Order, March 11, 1941.
E.P. 300. **Shipbuilding and Ship-repairing** (Essential Work) Order, March 6, 1941.
E.P. 297. **Threshed Home-Grown Peas** (Control and Maximum Prices) Order, 1940. Amendment Order, March 5, 1941.
No. 290. **Trading with the Enemy** (Specified Areas) Order, March 5, 1941.
No. 286. **Trustee Savings Banks** (Special Investments) Regulations, March 4, 1941.

[E.P. indicates that the Order is made under Emergency Powers.]

DRAFT STATUTORY RULES AND ORDERS, 1941.

India. **Reserved Posts** (Other Services) Rules, 1938. Amendments, 1941.

PROVISIONAL RULES AND ORDERS, 1941.

Public Assistance (Casual Poor) Amendment Provisional Regulations, March 6, 1941.

PRACTICE NOTE.

Misapprehension appears to exist with regard to the evidence required for the Court of Appeal in appeals where a question of fact is involved. Order 58, r. 11 of the Rules of the Supreme Court is quite clear on this matter. It is only the evidence oral and documentary bearing on *the question of fact involved in the appeal* that is required. Accordingly, if for example the appeal is only concerned with the question of damages, copies of evidence relating solely to the question of liability should not be lodged and *vice versa*. This applies alike to transcripts of the shorthand note of the evidence of witnesses and to correspondence, plans and other documents.

It is also desirable to state for information that the duty of the clerks to the Lords Justices is confined to receiving papers lodged for the purpose of appeals which must be lodged in Room 321. It is no part of the function of the Lords Justices' clerks and they have no authority to give advice as to the papers which ought to be lodged in individual cases.

17th March, 1941. WILFRID GREENE, M.R.

Court Papers.

SUPREME COURT OF JUDICATURE.

ROTA OF REGISTRARS IN ATTENDANCE ON

DATE.	EMERGENCY ROTA.	APPEAL COURT No. I.	MR. JUSTICE FARWELL.
	Mr.	Mr.	Mr.
Mar. 24	Hay	Blaker	Andrews
,, 25	More	Andrews	Jones
,, 26	Blaker	Jones	Hay
,, 27	Andrews	Hay	More
,, 28	Jones	More	Blaker
,, 29	Hay	Blaker	Andrews

	GROUP A.		GROUP B.	
	MR. JUSTICE BENNETT. Non-Witness.	MR. JUSTICE SIMONDS. Witness.	MR. JUSTICE UTHWATT. Non-Witness.	MR. JUSTICE MORTON. Witness.
	Mr.	Mr.	Mr.	Mr.
Mar. 24	More	Blaker	Jones	Hay
,, 25	Blaker	Andrews	Hay	More
,, 26	Andrews	Jones	More	Blaker
,, 27	Jones	Hay	Blaker	Andrews
,, 28	Hay	More	Andrews	Jones
,, 29	More	Blaker	Jones	Hay

Stock Exchange Prices of certain Trustee Securities.

Bank Rate (26th October, 1939) 2%. Next London Stock Exchange Settlement, Thursday, 3rd April, 1941.

	Div. Months.	Middle Price 19 Mar. 1941.	Flat Interest Yield.	† Approximate Yield with redemption.
ENGLISH GOVERNMENT SECURITIES.			£ s. d.	£ s. d.
Consols 4% 1957 or after	FA	110½	3 12 5	3 3 1
Consols 2½%	JAJO	77⅛	3 4 6	—
War Loan 3½% 1955–59	AO	100⅜	2 19 8	2 19 1
War Loan 3½% 1952 or after	JD	104¼	3 7 2	3 1 6
Funding 4% Loan 1960–90	MN	114	3 10 2	3 0 7
Funding 3% Loan 1959–69	AO	99	3 0 7	3 1 1
Funding 2½% Loan 1952–57	JD	98⅛	2 15 10	2 17 4
Funding 2½% Loan 1956–61	AO	92	2 14 4	3 0 8
Victory 4% Loan Average life 20 years	MS	111	3 12 1	3 4 10
Conversion 5% Loan 1944–64	MN	108⅜	4 12 1	2 0 0
Conversion 3½% Loan 1961 or after	AO	103½	3 7 8	3 5 2
Conversion 3% Loan 1948–53	MS	101⅛	2 19 1	2 14 10
Conversion 2½% Loan 1944–49	AO	99½	2 10 4	2 12 2
National Defence Loan 3% 1954–58	JJ	101½	2 19 1	2 17 3
Local Loans 3% Stock 1912 or after	JAJO	90⅞	3 6 1	—
Bank Stock	AO	348	3 9 0	—
Guaranteed 3% Stock (Irish Land Acts) 1939 or after	JJ	91	3 5 11	—
Guaranteed 2½% Stock (Irish Land Act, 1903)	JJ	84	3 5 6	—
Redemption 3% 1986–96	AO	95	3 3 2	3 3 10
Sudan 4½% 1939–73 Average life 18½ years	FA	110	4 1 10	3 14 9
Sudan 4% 1974 Red. in part after 1950	MN	108	3 14 1	3 0 3
Tanganyika 4% Guaranteed 1951–71	FA	109	3 13 5	2 18 11
Lon. Elec. T. F. Corpn. 2½% 1950–55	FA	93	2 13 9	3 1 9
COLONIAL SECURITIES.				
*Australia (Commonwealth) 4% 1955–70	JJ	104	3 16 11	3 12 7
Australia (Commonwealth) 3½% 1964–74	JJ	94	3 9 2	3 11 3
Australia (Commonwealth) 3% 1955–58	AO	93xd	3 4 6	3 10 7
*Canada 4% 1953–58	MS	110	3 12 9	2 19 11
New South Wales 3½% 1930–50	JJ	99	3 10 8	3 12 6
New Zealand 3% 1945	AO	98	3 1 3	3 10 10
Nigeria 4% 1963	AO	106xd	3 15 6	3 12 2
Queensland 3½% 1950–70	JJ	99	3 10 8	3 11 1
*South Africa 3½% 1953–73	JD	102	3 8 8	3 6 0
Victoria 3½% 1929–49	AO	99	3 10 8	3 12 8
CORPORATION STOCKS.				
Birmingham 3% 1947 or after	JJ	84⅛	3 11 0	—
Croydon 3% 1940–60	AO	92	3 5 3	3 11 10
Leeds 3½% 1958–62	JJ	97	3 7 0	3 9 1
Liverpool 3½% Redeemable by agreement with holders or by purchase	JAJO	96	3 12 11	—
London County 3% Consolidated Stock after 1920 at option of Corporation	MJSD	87½	3 8 7	—
*London County 3½% 1954–59	FA	102	3 8 8	3 5 11
Manchester 3% 1941 or after	FA	84	3 11 5	—
Manchester 3% 1958–63	AO	92½xd	3 4 10	3 9 7
Metropolitan Consolidated 2½% 1920–49	MJSD	98	2 11 0	2 15 1
Met. Water Board 3% "A" 1963–2003	AO	88	3 8 2	3 9 5
Do. do. 3% "B" 1934–2003	MS	89½	3 7 0	3 8 1
Do. do. 3% "E" 1953–73	JJ	92	3 5 3	3 8 3
Middlesex County Council 3% 1961–66	MS	94	3 3 10	3 7 2
*Middlesex County Council 4½% 1950–70	MN	107	4 4 1	3 10 7
Nottingham 3% Irredeemable	MN	83	3 12 3	—
Sheffield Corporation 3½% 1968	JJ	101	3 9 4	3 8 10
ENGLISH RAILWAY DEBENTURE AND PREFERENCE STOCKS.				
Great Western Rly. 4% Debenture	JJ	106½	3 15 1	—
Great Western Rly. 4½% Debenture	JJ	113½	3 19 4	—
Great Western Rly 5% Debenture	JJ	122½	4 1 8	—
Great Western Rly. 5% Rent Charge	FA	118	4 4 9	—
Great Western Rly. 5% Cons. Guaranteed	MA	116½	4 5 10	—
Great Western Rly. 5% Preference	MA	86½	5 15 7	—

*Not available to Trustees over par.
† In the case of Stocks at a premium, the yield with redemption has been calculated at the earliest date; in the case of other Stocks, as at the latest date.